

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1202

To be argued by
JOEL N. ROSENTHAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1202

UNITED STATES OF AMERICA,

Appellee,

—v.—

DELORES M. CANTY,

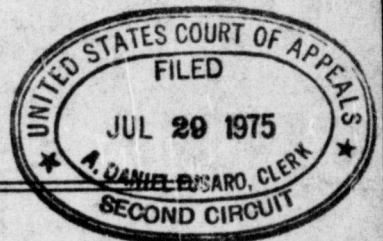
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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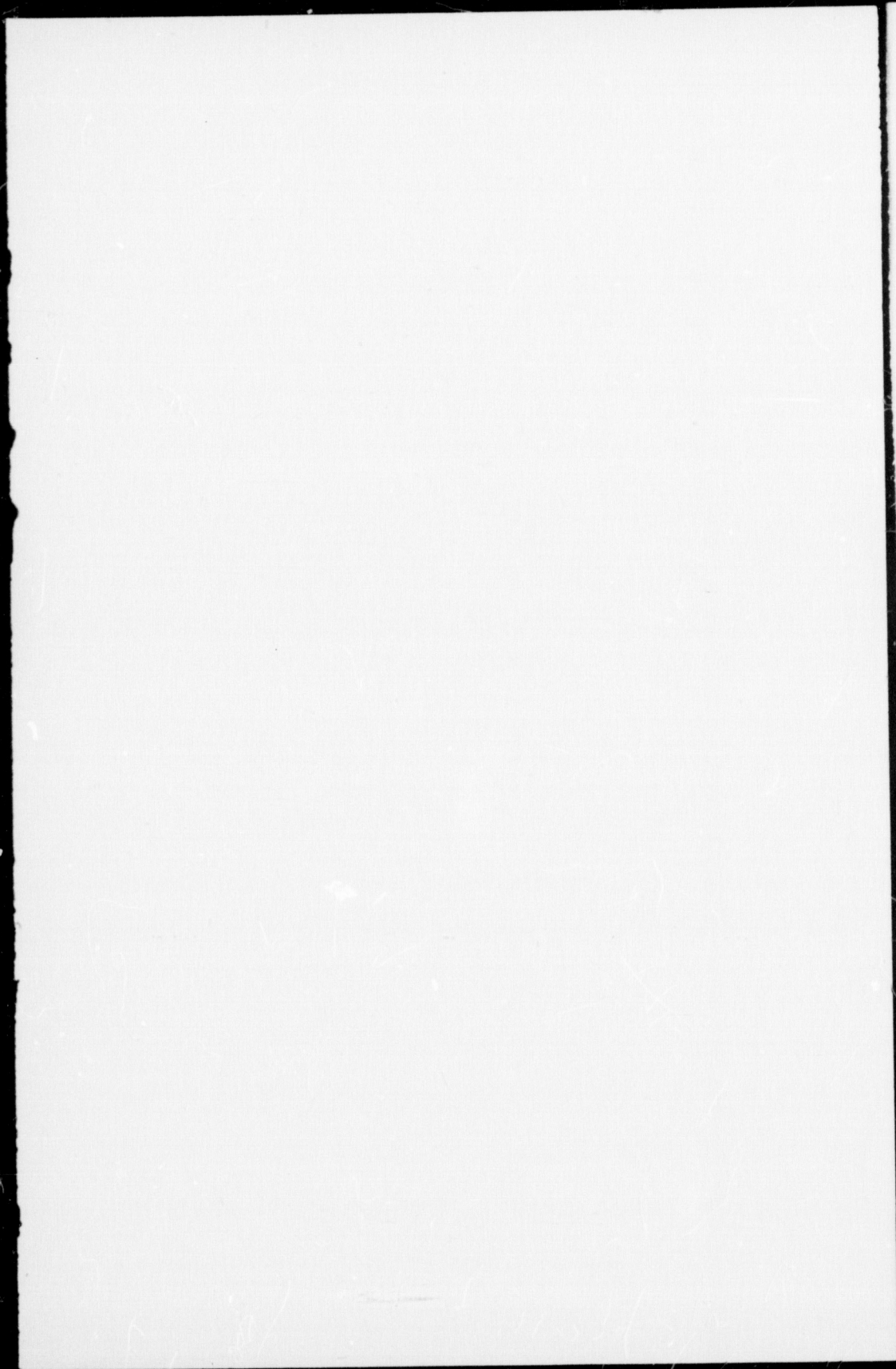


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Delores Canty appeals from a judgment of conviction entered on May 20, 1975, in the United States District Court for the Southern District of New York following a two-day trial before the Honorable Edmund L. Palmieri, United States District Judge, and a jury.

Indictment 74 Cr. 1161, filed December 10, 1974, charged Canty in Count One with embezzlement of bank funds, Title 18, United States Code, Section 656, and in Counts Two and Three with making false entries in a teller's proof sheet on November 12 and 19, 1974, Title 18, United States Code, Section 1005.

Trial commenced on April 7, 1975 and ended on April 8, when the jury found Canty guilty on all three counts.

On May 20, 1975, Canty was sentenced to concurrent terms of four years imprisonment and \$5,000 fines on each count. She is presently serving her sentence.

Statement of Facts

The Government's Case

The Government's proof at trial established that on November 12, 1974, Delores Canty embezzled \$20,300 in cash while employed as a teller by the Central State Bank. In order to conceal the theft, she made false entries on her daily proof sheet on the same day. Then on November 19, 1974, in an effort to further conceal her theft, she made another false entry, this time on a combined proof sheet which reflected the work of all the tellers working in the bank on that day.

Norma Vincent, an auditor with 14 years' experience employed at the same branch of the Central State Bank in New York City as Canty, was the main government witness. Mrs. Vincent testified that on November 20, 1974 a surprise cash count was conducted at the 48th Street branch of that bank. As a result of this cash count the auditors determined that a \$20,300 "difference" appeared in the bank's books (Tr. 44). That is, the amount of cash counted on November 20 was \$20,300 less than the bank's general ledger (GX 2) indicated should have been in the vault. This discovery caused the auditors to examine the proof sheets of the bank's three* tellers to determine whether this difference was merely a clerical error or a real shortage.

The \$20,300 difference was traced to a shortage in Delores Canty's cash as of November 12, 1974 (Tr. 76-77), which had been concealed by false entries in the Treasury Tax & Loan Account columns on proof sheets prepared by Canty on November 12 and 19.

* Only two tellers were present on November 19—the defendant and Joseph Bunniceili. Proof sheets were prepared for all three tellers, however—the absent teller's proof sheet having been prepared by Joseph Bunniceili as if no transactions had occurred on that day (Tr. 187).

The Treasury Tax & Loan Account was a means for various bank customers to pay their Federal Withholding Tax by submitting checks payable to the bank, which, in turn, would make the quarterly payments to the government on behalf of the customer. The Treasury Tax & Loan Accounts were processed in the following manner: the customer would submit a check payable to the bank in the amount of the quarterly tax, together with a computer card, bearing the customer's account number, amount of the check, and other identifying data; both the cards and the checks would be mailed or hand delivered to the bank, where they would be distributed to tellers randomly for processing (Tr. 53-54). Corresponding cards and checks would always be processed together by the same teller and, as Mrs. Vincent testified (Tr. 53) and the defendant conceded (Tr. 143-144), all tellers had instructions not to process cards or checks separately.* Upon receipt of the cards and checks, tellers, including the defendant, would hand stamp the computer card with a stamp bearing that teller's number and the date. The teller would also then process the checks through his teller's machine, which would record his teller's number and the date (Tr. 57).

The Treasury Tax & Loan Account cards and checks received by each teller were treated as offsetting credits and debits on each teller's proof sheets. Thus, the sums reflected on the cards were entered by tellers on the credit side of their daily proof sheets in the "Treasury Tax & Loan" column, while the corresponding amounts reflected in the checks were treated as debits and entered in the "House checks" column on the opposite side of the proof sheet (Tr. 54). If, for any reason a Treasury Tax & Loan Account card was not processed, the customer's payment to the government would not be made by the bank,

* In fact, processing on separate days would cause an imbalance in a teller's daily proof sheet.

and after a while the customer would be informed by the government of the deficiency.

Examination of the Treasury Tax & Loan Accounts processed by Delores Canty for the week preceding the surprise cash count revealed that on November 12 she had processed \$35,032 worth of Treasury Tax & Loan Account checks, as reflected in the tape from her teller's machine (GX 9A, 9B) and the checks actually submitted by various customers. Her proof sheet, however, only reflected a credit entry of \$14,732 in Treasury Tax & Loan Account cards for that date (GX 9) and indeed only \$14,732 in such cards were actually processed by her on that date (GX 7). Thus, the auditors found that Delores Canty had reduced her "cash on hand" in the debit column by \$20,300 on November 12, and, to make her proof sheet balance, simply failed to enter the additional \$20,300 in Treasury Tax & Loan Account card credits in the credit column.

The auditors also learned that on November 19, Delores Canty was responsible for the preparation of that day's tellers' combined proof. The combined proof consisted of each teller's daily proof added together into one complete proof. On November 19 Delores Canty performed that addition, based upon examination of the other tellers' work (the actual checks, deposit slips, etc.) and their individually prepared proof sheets.* The auditors found that on November 19, Delores Canty had added the Treasury Tax & Loan Account entries for that day of all three tellers and reached the total of \$41,412. In fact, that total of Treasury Tax & Loan Account cards were processed by the bank that day; however, the combined proof reflected \$20,300 more in cards than the total based upon simple addition of the

* Canty had four separate proofs to work with: hers, Bunniceilli's (which comprised two pages) and Alexander Major's, who was absent but for whom a proof was prepared and submitted by Bunniceilli.

amounts reflected in the individual proofs, for the Treasury Tax & Loan Account entries on the four separate tellers' proof sheets, when added, equalled only \$21,112 (Tr. 51). Examination of the cards (GX 6A-H) stamped November 19 and comprising the additional \$20,300, indicated that they referred to the Treasury Tax & Loan Account checks processed by Canty on November 12, a week earlier. The auditors further found that the "cash on hand" in the debit column was overstated by \$20,300: the total amount of cash on hand actually counted was \$240,282, while the figure entered by Delores Canty on the combined proof was \$260,582. Addition of the "cash on hand" totals on the tellers' proof sheets equalled only \$240,282 (Tr. 48-49). Thus, Delores Canty had submitted the Treasury Tax & Loan Account cards she had withheld for a week and, to cover the imbalance this would cause in the combined proof sheet, simply overstated the cash on hand when she prepared the combined proof sheet by the corresponding amount. Neither the cards nor the overstated cash were reflected in any teller's individual proof. Although the tellers' stamp number on the cards was almost illegible, portions of Delores Canty's teller number could be read on one of them.

Mrs. Vincent further testified that each teller was required to keep his teller's stamp in a locked drawer to which only she had the key (Tr. 96-97).^{*} Moreover, each teller processed checks through a stationary teller's machine, which, like the hand stamp, no other teller was permitted to use for his own work (Tr. 92-93).

Finally, Mrs. Vincent testified that when, at the end of the audit on November 20, the \$20,300 difference was located in the combined proof sheet prepared by Delores

^{*} On the Government's rebuttal case Joseph Bunnicelli testified that each teller kept his cash and his stamp in his locked cash drawer (Tr. 192-193). Canty conceded as much in her testimony (Tr. 117).

Canty, Canty was called downstairs to the auditing office and asked by Mary McCray, an assistant auditor, how she arrived at the (incorrect) figure for cash on hand in her combined proof on November 19. Canty's response was to state that she didn't know and didn't wish to get involved in any differences (Tr. 65). She thereupon left the auditor's office.

The government's direct case concluded with the testimony of Millie Borrás, who had been Delores Canty's supervisor at the bank during November, 1974. Miss Borrás testified that on November 21, the day following the audit, Delores Canty came to work late and was reprimanded. Canty thereupon offered to leave the bank, but refused to prove her work from the previous day despite being requested to do so twice. Canty thereupon quit her job (Tr. 103-105).

The Defense Case

Delores Canty testified in her own behalf. She stated that she had previous experience as a teller * and repeatedly denied embezzling the \$20,300, or intentionally making false entries on the proof sheets (Tr. 110-112).

She further testified that the bank did not require her to lock up her teller's hand stamp and that other tellers could have had access to it, as well as to her teller's machine, although she never knew of any instance where an unauthorized use had occurred (Tr. 115-118), or where anyone else had ever used her cash drawer (Tr. 150-151). With respect to the false entries, she acknowledged preparing her individual proof sheet for November 12, 1974 and the combined proof sheet for November 19, 1974, each of which contained false entries (Tr. 161-162). She claimed that the entries were to her belief correct when she made them (Tr.

* Nearly 5 years according to counsels' stipulation (Tr. 101).

110-111, 161). She also admitted that she was the only teller with a key to her cash drawer (Tr. 117-118).

On cross-examination the defendant repeatedly stated that she still hadn't "seen where [Mrs. Vincent] proved" that \$20,300 was missing from her cash (Tr. 141, 151). Canty further stated that the proof sheets for November 19 (GX 4A-E) were not the same ones that she had used to prepare the combined proof, or that they had been altered or tampered with between the afternoon of November 19 and the morning of November 20 when the cash count occurred (Tr. 122, 123, 139, 161-162). When she was unable to explain how \$20,300 in Treasury Tax & Loan Account checks were processed on November 12, bearing her teller's machine stamp, but the corresponding cards were not processed until one week later, or how she managed to balance her own (November 12) proof sheet without reflecting a \$20,300 difference, Canty suggested that someone else had put the checks through her machine (Tr. 128). She further admitted that she knew of no instance when Treasury Tax & Loan Account cards and related checks had not been received simultaneously by her. She also admitted that if she had received any such cards without corresponding checks, or vice versa, she was under instructions to turn them over to an officer and not to enter them on her daily proof sheet (Tr. 142-144).

Finally, Canty testified that her statement to the auditors on November 20 had been intended as a joke, that her conversation had been with Norma Vincent, not Mary McCray, and that she had stayed with the auditors for nearly half an hour that day in an effort to locate the difference (Tr. 136-132, 164-166).

The defense rested without calling any additional witnesses or offering further proof.

The Government's Rebuttal Case

The government called four witnesses in its brief rebuttal case. Mary McCray, an assistant auditor at the Central State Bank, testified that on November 20, 1974, when the \$20,300 difference was first ascertained in Delores Canty's proof, Canty was called to the auditor's office and asked by Mrs. McCray if she could explain the difference. Canty indicated she was unaware of the difference in her proof and "didn't want to be involved in any differences" (Tr. 177). In contradiction to Canty's claim that she stayed with the auditors in an effort to help them locate the difference, Mrs. McCray testified that Canty left the auditor's office immediately after the conversation with Mrs. McCray, which occurred almost at closing time, and did not make any effort to assist the auditors (Tr. 177-178).

Irving King, an assistant treasurer at the Central State Bank, produced the bank's attendance card for Alexander Major (GX 13), which reflected Major's absence from work on November 19, the date the \$20,300 in Treasury Tax & Loan Account cards were processed and the combined teller's proof was made up by Delores Canty.

Joseph Bunniceili, the third teller employed by the Central State Bank during the week from November 12 to 19, 1975, testified that he did not falsify or substitute any proof sheets, that he never used another teller's hand stamp or cash drawer, and that he stole no money from the bank (Tr. 187-188).^{*} On cross-examination he testified that it would be almost impossible for a teller not to know that someone else was using his or her teller's machine (Tr. 189-191).

^{*} Bunniceili also confirmed that he had prepared Major's proof on November 19 because Major had been absent from the bank that day (Tr. 186-187).

Norma Vincent was recalled and again demonstrated through the proof sheets and other exhibits that \$20,300 in cash was missing from the bank and that it had come from Delores Canty's cash drawer (Tr. 198-200).

ARGUMENT

POINT I

There was no error in the District Court's instructions to the jury.

Canty claims that the manner of Judge Palmieri's reference in his charge to a portion of her summation was reversible error. The contention is without merit.

Early in the trial, Canty suggested through questions on cross-examination of Norma Vincent that either of the other two tellers at the bank, and specifically Joseph Bunniceili, might have committed the embezzlement and used Canty's teller's stamp and machine to cover his tracks (Tr. 81, 83-85, 88). Canty repeated this suggestion in her testimony (Tr. 115-118).

Thereafter, the Government called Joseph Bunniceili, the only other teller besides Canty who had been working on both November 12 and November 19.* Bunniceili denied having embezzled the funds and using Canty's teller's stamp and teller's machine.

In his summation, Canty's counsel again picked up the theme that Bunniceili, and not Canty, was the probable culprit:

"Now, Miss Canty said that someone else can use her machine. Mr. Bunniceili said no. Mr. Rosenthal

* The third teller at the bank, Alexander Major, was working November 12 but was absent on November 19.

asked Mr. Bunnlicelli, 'did you embezzle the funds?' Well, you know, let's face it. Do you think Mr. Bunnlicelli would say that he did something if he did do it? No one is accusing him of it. But he certainly, if he did have anything to do with it, wasn't going to make any admissions. He would be a very foolish young man if he did.

And I'm not saying that he didn't . . ." (Tr. 209).

In discussing the evidence and the contentions of the parties during the course of his instructions to the jury, Judge Palmieri referred to this argument as follows:

"Mr. Kaplan, as attorney for the defendant, said that the other teller, Joseph Bunnlicelli, may have been the thief. He didn't say it directly and he didn't accuse him of it, but it is there. It would be naive to understand his remarks in the closing summation as meaning anything else. If I recall correctly, he said, 'Would Bunnlicelli say it if he did it? I'm not saying he did it. But he would be a foolish young man if he did.'

Well, now, what does that mean, ladies and gentlemen? What does it mean? It means that an accusation is being made against the other teller. You've got Bunnlicelli's testimony before you that he never committed this theft. You have the testimony of Delores Canty saying she never did it. But you have the overwhelming testimony in the case which should lead you to believe that \$20,300 left the coffers of this bank. And you've got to decide whether you heard the truth from Bunnlicelli or whether you heard it from the defendant. Because, depending on how you decide that issue, it will take you a long way in the direction of deciding other issues in the case" (Tr. 258-259).

After the charge, Judge Palmieri took exceptions at the sidebar. Canty's was limited to

"I take exception to your Honor's charge, especially with respect to the marshalling of the evidence. I thought it was more of an argument.

I also respectfully take exception to your Honor's comment on my summation" (Tr. 265).

The record thus establishes the utter want of merit in Canty's contentions. The right of a District Judge to summarize and to comment on the evidence in his instructions to the jury is settled in this Circuit. *United States v. Tramunti*, 513 F.2d 1087, 1120 (2d Cir. 1975); *United States v. DeLaMotte*, 434 F.2d 289, 291-292 (2d Cir. 1970); *United States v. Tourine*, 428 F.2d 865 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *United States v. Kahaner*, 317 F.2d 459, 479 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). The purpose of such comments is

"... to assist the jury in winnowing out the truth from the mass of evidence, much of it conflicting, and perhaps placed out of focus by different claims concerning its meaning and interpretation by the arguments of the parties."

United States v. Tourine, *supra*, 428 F.2d at 869. The Judge may not, however, "impose his own opinions and conclusions as to the facts on the jury and does not act as an advocate in advancing factual findings of his own." *Id.* The test of whether a judge's comments upon and summary of the evidence is fair to the defendant "must be judged in the context of the whole trial record, particularly the evidence and the arguments of the parties." *United States v. DeAngelis*, 490 F.2d 1004, 1009 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974); *United States v. Tourine*,

supra. Such an analysis in this case compels the conclusion that the trial judge's comments were fair and appropriate.*

Canty claims (Brief at 16) that the Court criticized defense counsel when it suggested (Tr. 258-259) that the tenor of Mr. Kaplan's remarks was that Bunniceili might have been the thief. However, the trial court's remarks on this point only served to clarify what counsel was insinuating; indeed, in her brief, Canty concedes that this was the thrust of defense counsel's remarks: "The comment and intimation by defendant's counsel in his summation regarding the possibility that someone other than the defendant could have used her teller's machine and that that someone could possibly be Bunniceili, although 'no one is accusing him of it' was fair argument . . ." (Brief at 15). Manifestly, the Court quite accurately characterized the thrust of defense counsel's remarks about Bunniceili.** However, there is nothing that Canty can point to in the Court's

* While we reach the merits of Canty's claim, it is by no means certain that this Court should. Defense counsel's brief and cryptic remarks at the conclusion of the District Court's charge (Tr. 266) virtually track the language of the exception found insufficiently specific in *United States v. Pinto*, 503 F.2d 718, 723 (2d Cir. 1974). While here Canty's counsel added to his general exception an exception "to your Honor's comment on my summation," this hardly expressed the point now argued and indeed might, but for the time of its making, have more likely been understood to refer to a remark made by the Court during the Government's summation in overruling an objection by the defense (Tr. 232).

** Indeed, while Canty seems to imply that the Court overstated her position about Bunniceili's possible guilt in his instructions and thus impliedly criticized the argument, the opposite is true. Judge Palmieri, in attempting to recapitulate defense counsel's remarks, repeated his statement "He would be a very foolish young man if he did" but diluted counsel's more direct accusation that "And I'm not saying that he didn't" (Tr. 209, 258-259).

charge * that even implies criticism of defense counsel for suggesting that Bunniceili was the thief.**

Canty also contends that the trial court improperly narrowed the issue in the case to whether the defendant or Bunniceili was the thief, and that if the jury found that it was not Bunniceili, "then they must perforce find that defendant was the thief" (Brief at 16). This contention is without merit. The trial court's instructions fell far short of suggesting to the jury that resolution of the conflicting testimony of the defendant and Bunniceili was dispositive of the case. Rather the Court suggested no more than that a determination by the jury whether it believed Canty or whether it believed Bunniceili would "take [the jury] a long way in the direction of deciding other issues in the case." This was exactly the way in which defense counsel, and the Government in response, had framed the issue for the jury. In his summation defense counsel clearly suggests in his remarks on the credibility of Canty

* The Court criticized defense counsel out of the presence of the jury on this score (Tr. 200-201); however, none of this criticism appears in the Court's charge, or in any other remarks in the jury's presence.

** Canty's claim that the judge criticized this aspect of the defense summation purports to draw strength from the fact that the Judge in no way found fault with Canty's argument that a reasonable doubt should arise from the Government's failure to call Alexander Major, the third teller at the bank and the only other possible suspect besides Canty and Bunniceili. However, given Major's crucial absence from the bank on November 19, which Canty conceded in her summation (Tr. 210), the argument was without basis in the evidence. More important, since Major was as available to Canty as to the Government, the Court's failure to give an instruction that no inference could be drawn against the Government or that one could be drawn against either side, *United States v. Brown*, 511 F.2d 920, 924-926 (2d Cir. 1975); *United States v. Super*, 492 F.2d 319, 323 (2d Cir.), cert. denied, 419 U.S. 876 (1974); *United States v. D'Angiolillo*, 340 F.2d 453, 457 (2d Cir.), cert. denied, 380 U.S. 995 (1965); cf. *United States v. Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968), was a boon to the defense.

and Bunniceili that they were the only persons who could have been involved in the theft. Thus, the issue of Canty's credibility was raised directly in defense counsel's summation:

"You heard Miss Canty testify. You must decide, is Miss Canty lying?" (Tr. 207).

Thereafter, defense counsel made his remarks, quoted above at pages 9-10, strongly implying that Bunniceili was lying in his denial that he was the real culprit (Tr. 209). Towards the conclusion of his summation, defense counsel virtually conceded that only Canty or Bunniceili would have committed the embezzlement when he admitted that there was no dispute that Alexander Major was absent on November 19 (Tr. 210), the day when the remaining Treasury Tax & Loan Account cards were processed, and when the second false entry was made on the bank's books.

Counsel for the Government stressed in summation that since only Canty and Bunniceili were present at the bank on the two days when the false entries were made, the theft occurred and the Treasury Tax and Loan Account cards and checks were processed, "... it is either Joe Bunniceili or it is her" (Tr. 219). Only one of the two could have been telling the truth that he or she had not stolen the money or falsified the proof sheets; the evidence at trial compelled this analysis.

The trial court quite plainly perceived how the issue had been framed by the evidence and the contentions of the parties. At the outset of his instructions, however, the Court specifically advised the jury that they were the sole fact finders, and that any references by the Court to the testimony or evidence could be utterly disregarded:

"As I told you at the outset, you are the judges of the facts of this case. All of the evidence is before you. All of the arguments of counsel are before you. You should consider them carefully.

You can pick and choose among that evidence, among the exhibits, among the testimony, the words of the witnesses who have testified, and it is up to you and you alone to decide where the truth is and what significance to attach to that truth as you find it.

If I refer to any of the evidence, please do not feel that I am trying to suggest any conclusions to you. I am not. I have no desire to impinge upon your exclusive fact finding function in any way, and you are entitled to the opinion that evidence to which I do not refer is even more important than the evidence to which I do refer. It is another way of saying that you are the only judges of the facts and that all of the evidence is before you" (Tr. 235).

After defining various elements of the crimes charged which the jury was required to find beyond a reasonable doubt before they could find the defendant guilty, the Court discussed the weight that the jury might give to the testimony of a witness it determined had testified falsely:

"Now, as I said, the charge of willful falsehood has been made with respect to at least two witnesses in the case, Delores Canty and Joseph Bunnicelli, the other teller. If you find that any witness told a willful falsehood during the testimony in this case, you can do one of two things. You can either reject all of it on the ground that all of it is tainted by falsehood and none of it worthy of belief, or you can accept that part which is credible and reject that part which you believe to be tainted by falsehood. It is like a person eating a fruit which appears to be sound and wholesome and suddenly discovering an imperfection. Some persons will cut out the imperfection and eat the rest of the fruit. Others will reject the whole fruit.

And it is pretty much what the law says you can do with the testimony of a lying witness. And it depends pretty much, in most cases, upon the extent to which you believe the testimony is tainted by falsehood or the fruit, by comparison, is tainted by an imperfection" (Tr. 255-256).

Against this background the Court framed the issues for the jury and suggested only that their resolution of the conflict in the testimony of Canty and Bunniceili would "take you a long way in the direction of deciding other issues in the case" (Tr. 258-259). The Court's charge clearly did not invite the jury to decide the case solely upon the resolution of the conflicting testimony; the jury was carefully instructed that it must first find that there was proof of all elements of the crime charged beyond a reasonable doubt. But, as the Judge fairly suggested in the portion of his charge under attack, belief of Canty's testimony would go a long way to resolving the case; indeed, it would have required an acquittal. Similarly, disbelief of Bunniceili's denial that he had embezzled the money would have raised a reasonable doubt of substantial magnitude. The challenged portion of the Court's charge merely suggested that the jury's deliberations would be advanced by focusing on the testimony of Canty and Bunniceili. Cf. *United States v. Tyers*, 487 F.2d 828, 832 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974). As such, the Judge made fair comment on a crucial aspect of the testimony solely to aid the jury in its deliberations, which, coupled with his instruction that the jury was not bound by his summary of the evidence, could not have caused the jury to feel bound by the Court's remarks. Moreover, far from suggesting that determining the credibility of Canty and Bunniceili was the only way to dispose of the case, Judge Palmieri *immediately* went on to an entirely different aspect of the evidence which in no way depended on Bunniceili's credibility and only in a small way on Canty's. Referring to Canty's testimony that her hand stamp and teller's machine could have been used by the real culprit to cover his tracks, the Court said:

"You've got to consider that and ask yourself: Was her hand stamp ever used by anybody else? Was her teller's machine ever used by anybody else except by her? Because, depending upon how you answer those questions, those answers will take you a long way in the direction of resolving the basic issues in the case" (Tr. 259).

In short, this is not a case where the Court expressed an opinion about the defendant's guilt. *United States v. Murdock*, 290 U.S. 389 (1933); *United States v. Woods*, 252 F.2d 334 (2d Cir. 1958). Nor did the Court assume the role of a witness when commenting upon the testimony by distorting or adding to the evidence in the case, *Quercia v. United States*, 289 U.S. 466 (1933), or attempt to force upon the jury deductions and theories not warranted by the evidence, *Starr v. United States*, 153 U.S. 61 (1894). Even giving full weight to Canty's claim, the brier portion of the charge now challenged on appeal was hardly "... so unfair and unwarranted as to require reversal" *United States v. LaVecchia*, 513 F.2d 1210, 1214-1215 (2d Cir. 1975); Compare *United States v. Pinto*, *supra*; *United States v. DeAngelis*, *supra*.

POINT II

The sentence imposed is proper and is not subject to review on appeal.

Canty complains on appeal that the sentence imposed was "harsh and excessive" (Brief at 17), though she does not clearly state what a proper sentence in this case should be. In any event, her claim is without merit.

The law is settled that, "... absent reliance on improper considerations ... or materially incorrect information, a sentence within statutory limits is not reviewable."

United States v. Velazquez, 482 F.2d 139, 142 (2d Cir. 1973); *Dorszynski v. United States*, 418 U.S. 424, 440-441 (1974); *United States v. Driscoll*, 496 F.2d 252, 254 (2d Cir. 1974).

Canty makes no claim that Judge Palmieri relied on materially inaccurate information in imposing sentence. Her claim that the sentence was too harsh is rebutted by the fact that, on the three counts on which Canty was convicted, she was liable to consecutive terms of imprisonment totalling a maximum of fifteen years. Moreover, there was clearly no reliance on improper factors by Judge Palmieri. The record establishes that the Court did not employ a "mechanical" sentencing policy, *United States v. Baker*, 487 F.2d 360 (2d Cir. 1973), and carefully considered the individual situation of the defendant, making specific reference to her background, her education and her intelligence (Tr. 276). He determined that a substantial sentence was warranted for purposes of retribution and deterrence, perfectly proper considerations. *E.g.*, *United States v. Kaylor*, 491 F.2d 1133, 1139-1140 (2d Cir.) (*en banc*), *vacated and remanded on other grounds*, 418 U.S. 909 (1974); *United States v. Baker, supra*, 487 F.2d at 363 (Lumbard, *C.J.*, dissenting). Moreover, in addition to the evidence at trial of Canty's guilt of a serious offense, Judge Palmieri expressly noted (Tr. 277) that he was confronted with Canty's utter lack of remorse for her crime and a course of conduct disclosing, as this Court has described it, "... a manipulative defiance of the law [which] is not a cheerful datum for the prognosis a sentencing judge undertakes". *United States v. Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974). However, contrary to Canty's claim, she was by no means penalized for standing trial. Instead, the Court considered whether she had taken the first step towards rehabilitation by recognizing her guilt:

"[T]he first step toward rehabilitation of an offender is the offender's recognition that he was at fault. . . .

[N]o fault can be found of the judge who takes into consideration the extent of a defendant's rehabilitation at the time of sentence."

United States v. Floyd, 496 F.2d 982, 989 (2d Cir. 1974), quoting *Gollaher v. United States*, 419 F.2d 520, 530 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969). Having taken into account the individualized needs of this unrehabilitated offender and the society's interest in criminal punishment and deterrence, the Judge imposed a sentence without unwarranted harshness and within a proper exercise of his discretion. Canty has shown no basis to disturb her sentence.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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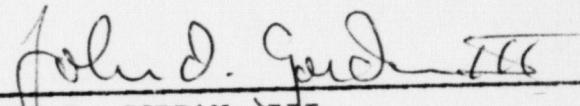
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN, III, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29th day of July, 1975
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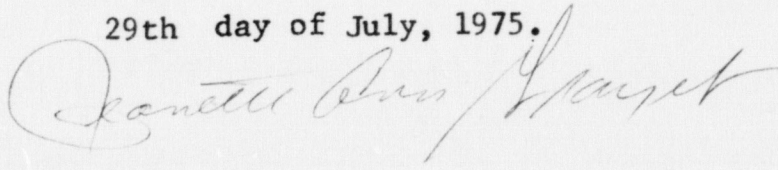
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JOHN D. GORDAN, III

Sworn to before me this

29th day of July, 1975.


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